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PACIFIC  **TELESIS**
Group-Washington

September 27, 1996

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

Dear Mr. Caton:

Re: *IB Docket No. 95-59, Preemption of Local Zoning Regulation of Satellite Earth Stations; CS Docket No. 96-83, Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service*

On behalf of Pacific Telesis Group, please find enclosed an original and six copies of its "*Comments on Further Notice of Proposed Rulemaking*" in the above proceeding.

Please stamp and return the provided copy to confirm your receipt. Please contact me should you have any questions or require additional information concerning this matter.

Sincerely,

Gina Harrison / *AF2*

Enclosure

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

Preemption of Local Zoning Regulation of Satellite
Earth Stations

IB Docket No. 95-59

In the Matter of

Implementation of Section 207 of the
Telecommunications Act of 1996

CS Docket No. 96-83

Restrictions on Over-the-Air Reception Devices:
Television Broadcast Service and Multichannel
Multipoint Distribution Service

COMMENTS OF PACIFIC TELESIS GROUP
ON FURTHER NOTICE OF PROPOSED RULEMAKING

I. INTRODUCTION AND SUMMARY

Pacific Telesis Group ("Pacific") hereby comments on the Commission's Further Notice of Proposed Rulemaking ("FNPRM").¹ We believe the Commission has the legal authority to prohibit nongovernmental restrictions that impair reception by viewers who do not have exclusive use or control and a direct or indirect ownership interest in the property.

¹ In the Matter of Preemption of Local Zoning Regulation of Satellite Earth Stations, IB Docket No. 95-59; In the Matter of Implementation of Section 207 of the Telecommunications Act of 1996, Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service, CS Docket No. 96-83, Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, FCC No. 96-328 (rel. August 6, 1996).

II. A RULE PROHIBITING RESTRICTIONS ON THE INSTALLATION OF ANTENNAS ON COMMON PROPERTY IS NOT A TAKING, AND THE COMMISSION HAS AUTHORITY TO PROMULGATE SUCH A RULE

The Commission asks for an analysis of whether the takings clause of the Fifth Amendment is implicated where antennas are allowed to be placed on common areas or rental properties not within the exclusive control of a person with an ownership interest. FNPRM, ¶ 59. In this regard, the Commission asks whether it has the legal authority to prohibit nongovernmental restrictions that impair reception by viewers who do not have exclusive use or control and a direct or indirect ownership interest in the property. *Id.*, ¶ 64. We believe the Commission has this authority and that no taking occurs when the Commission gives tenants and other non-owners the right to arrange for antenna installation on such property. Indeed, the Commission has already so found: “[W]e find that preemption of nongovernmental restrictions does not conflict with the Fifth Amendment. FNPRM, ¶ 43.

The Commission correctly observes that where a cable antenna is installed on common property for the benefit of tenants in rental property or of persons who own residential units but not the common property, the Loretto² holding may not apply. FNPRM, ¶ 64. As the dissent in Loretto aptly pointed out,

[i]t is far from clear that, under [the statute at issue], appellant’s tenants would lack all property interests in the few square inches on the exterior of the building to which Teleprompter’s cable and hardware attach. Under modern landlord-tenant law, a residential tenancy is not merely a possessory interest in specified space, but also a contract for the provision of a package of services and facilities necessary and appurtenant to that space. A modern urban tenant’s leasehold often includes not only contractual, but also statutory, rights, including the rights to an implied

² Loretto v. Teleprompter Manhattan CATV Corp. 458 U.S. 419 (1982).

warranty of habitability, rent control, and such services as the landlord is obliged by statute to provide.³

As the Commission notes, the majority opinion in Loretto did not necessarily rule out the possibility that a tenant (or other non-owner) might have a property right to have his video provider of choice install an antenna on his building. The Court observed that “[i]f [the statute at issue] required landlords to provide cable installation if a tenant so desires, the statute might present a different question from the question before us, since the landlord would own the installation.”⁴ Thus, the Loretto decision does not prevent the Commission from adopting a rule requiring “landlords [or owners of common property in condominium complexes] to provide [antenna] installation if a tenant [or occupant] so desires.”

Moreover, a residential tenant or condominium owner may have a property right to have the cable antenna of his chosen video provider installed on his building, even though he does not own the property on which it is installed (or any of the real property on which he lives). The Second Restatement of Property, for example, gives a tenant the right to “make changes in the physical condition of the leased property which are reasonably necessary in order for the tenant to use the leased property in a manner that is reasonable under all the circumstances.”⁵ The Restatement’s authors cite A&B Carbrini Realty Co. v. Newman⁶ for the proposition that “implicit in [the] letting out of premises are certain vested rights which are conveyed to [the] tenant as to use and enjoyment thereof which are of a reasonable and usual nature and which may not be alienated by unilateral fiat.”⁷

³ Id. at 454 n.11 (emphasis added), citing R. Schoshinski, American Law of Landlord and Tenant § 3:14 (1980).

⁴ Loretto, 458 U.S. at 440 n.19 (emphasis added).

⁵ Restatement (Second) of Property, § 12.2(1) (1977) (“R2d”). The foregoing provision does not apply if the parties to the lease “validly agree otherwise.” Id. (emphasis added).

⁶ 237 N.Y.S.2d 9740 (1963).

⁷ R2d, supra, Reporter’s Note 4 to Section 12.2 (emphasis added).

Furthermore, the Loretto decision did not eliminate a tenant's right to have the landlord comply with statutory requirements such as those the Court described in Loretto -- requirements of entrance doors and lights, windows and skylights for public halls and stairs, locks, lobby attendants, peepholes, elevator mirrors, fire escapes, doorbells, mail receptacles, fire sprinklers, and proper sinks.⁸ The Loretto majority explicitly acknowledged that such requirements were permissible:

[O]ur holding today in no way alters the analysis governing the State's power to require landlords to comply with building codes and provide utility connections, mailboxes, smoke detectors, fire extinguishers, and the link in the common area of a building. So long as these regulations do not require the landlord to suffer the physical occupation of a portion of his building by a third party, they will be analyzed under the multifactor inquiry generally applicable to non-possessionary governmental activity.⁹

Thus, it appears that the Loretto holding does not preclude a Commission rule requiring that the landlord install video antennas where the tenant requests them. Such a rule would be comparable legally to a rule requiring a landlord to install a doorbell or a mailbox -- requirements the Loretto Court did not disapprove.

Furthermore, alternative video providers have a First Amendment right to deliver their message -- in this case, video programming -- to customers. If the landlord or condominium association use their property as a bottleneck prohibiting such access -- such as by prohibiting a tenant or other non-owning inhabitant to arrange for the installation of the means necessary to receive this message -- they may violate the First Amendment rights of the video providers. Indeed, the Supreme Court in PruneYard Shopping Center v. Robins,¹⁰ rejected a takings claim by shopping center owners

⁸ Loretto, 458 U.S. at 449 n.7.

⁹ Id. at 440 (emphasis added).

¹⁰ 447 U.S. 74 (1980).

in favor of the rights of free expression of students who sought signatures on a petition on the center's property.¹¹

The decision in Bell Atlantic v. FCC,¹² does not divest the Commission of all authority to order installation of antennas. In that case, the court held the Commission could not force LECs to allow competitive access providers to co-locate in the LECs' central offices. There, the Commission relied only on its power "to order carriers 'to establish physical connections with other carriers . . .,'" and the court held this grant of power was insufficient to permit the Commission to order co-location in LEC central offices.¹³

Here, in contrast, the 1996 Act expressly grants to the Commission the power to "prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services."¹⁴ Thus, the Commission has been granted express statutory authority to do precisely what it proposes to do -- prohibit restrictions that impair viewers' ability to receive MMDS and other signals.

¹¹ Id. at 83-84. While the majority opinion in Loretto distinguished the PruneYard case, it did so on the ground that the "invasion" onto the shopping center owners' property in PruneYard was temporary, whereas the "invasion" in Loretto was viewed as "permanent." The Court did not consider whether a First Amendment claim of a right to free expression should defeat a takings claim. On the facts here, we believe that it should.

¹² 24 F.3d 1441 (D.C. Cir. 1994).

¹³ Id. at 1445-46, citing 47 U.S.C. § 201(a).

¹⁴ Telecommunications Act of 1996, Pub. L. 104-104, 111 Stat. 56 (1996) § 207 ("1996 Act") (emphasis added).

III. CONCLUSION

The Commission should exercise its authority under the 1996 Act to adopt rules that accomplish the intent of Congress to provide consumers with access to a full range of video programming delivery choices and to promote competition among video programming services.

Respectfully submitted,

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